



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for February 25, 2022**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Angela Bannister

**Respondent:** Department of Veterans Affairs

**Tribunal:** U.S. Court of Appeals for the Federal Circuit

**Case Number:** [21-1832](#)

**Petition for Review from** DA-0714-20-0517-I-1

**Issuance Date:** February 24, 2022

**Title 38 U.S.C. § 714**

**Whistleblowing Reprisal**

The agency proposed Ms. Bannister's removal under 38 U.S.C. § 714 on a charge of conduct unbecoming. After considering her written response, the deciding official issued a decision letter sustaining the charge, but mitigating the penalty to a 30-day suspension. In doing so, the deciding official found that "the charge as stated in the notice of proposed removal was supported by substantial evidence."

Ms. Bannister filed a Board appeal in which she contested whether the charged conduct occurred, and further alleged as an affirmative defense that the agency suspended her in retaliation for protected whistleblowing activity. The administrative judge found that the agency proved by substantial evidence

that Ms. Bannister engaged in conduct materially consistent with the specifications. The administrative judge further found that Ms. Bannister failed to establish her defense of whistleblowing reprisal. The initial decision subsequently became the final decision of the Board.

On appeal to the Federal Circuit, Ms. Bannister argued that the agency's decision was in error because the deciding official applied a substantial evidence standard instead of determining whether the charge was established by a preponderance of the evidence, as required under *Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290 (Fed. Cir 2021). She also contested the Board's findings on her affirmative defense.

**Holding:** Applying *Rodriguez*, the court vacated the portion of the Board's decision that sustained the charge and remanded for further proceedings under the correct legal standard. The court affirmed the portion of the Board's decision finding that the appellant failed to prove her defense of whistleblowing reprisal.

1. The court explained that it held in *Rodriguez* that the agency may not use a "substantial evidence" standard in taking an action under § 714. Rather, under § 714, the agency must use a "preponderance of the evidence" standard in determining whether the alleged misconduct occurred. The references to "substantial evidence" in § 714 "are all explicitly directed to the standard of review to be applied by administrative judges and the Board."
2. Because the deciding official used the incorrect standard of proof in reaching the final decision, the court vacated for further proceedings under the correct legal standard. The court suggested that this would involve a remand to the agency: "Presumably those further proceedings will include the Board requiring the VA's deciding official to determine whether the evidence as to the charge against Ms. Bannister satisfied the requisite preponderance-of-the-evidence standard of proof."
3. The court rejected the agency's contention that Ms. Bannister forfeited her *Rodriguez* argument because she did not raise it until her reply brief, which she filed about two months after *Rodriguez* was decided. Citing *In re Micron Tech., Inc.*, 875 F.3d 1091 (Fed. Cir. 2017), the court noted that "a sufficiently sharp change of law sometimes is a ground for permitting a party to advance a position that it did not advance earlier in the proceeding when the law at the time was strongly enough against that position." In this case, prior to *Rodriguez*, the court's case law "did not directly resolve" whether the agency was permitted to prove misconduct by only substantial evidence.
4. Finally, the court affirmed the Board's findings on Ms. Bannister's

affirmative defense. In particular, the court found that the Board considered the relevant evidence in assessing which of the alleged disclosures were protected, and properly applied the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), in finding that the agency met its burden of showing that it would have taken the same action absent the protected disclosures.

**Petitioner: Eric Terrell Bryant**

**Respondent: Department of Veterans Affairs**

**Tribunal: U.S. Court of Appeals for the Federal Circuit**

**Case Number: [21-1896](#)**

**Petition for Review from AT-0714-20-0709-I-1**

**Issuance Date: February 24, 2022**

**Title 38 U.S.C. § 714**

**Whistleblowing Reprisal**

The agency removed Mr. Bryant under 38 U.S.C. § 714 on a charge of conduct unbecoming a Federal employee. In the decision letter, the deciding official found that “the charge as stated in the notice of proposed removal was supported by substantial evidence.” The deciding official sustained the proposed removal without mentioning the *Douglas* factors.

Mr. Bryant filed a Board appeal, in which he contested whether the charged misconduct occurred and whether removal was an appropriate penalty under the *Douglas* factors. He also raised an affirmative defense of whistleblowing reprisal. The administrative judge found that the agency proved the charge by substantial evidence, and upheld the removal penalty. However, like the deciding official, the administrative judge did not conduct a *Douglas* factors analysis. The administrative judge further found that Mr. Bryant failed to establish his affirmative defense. The initial decision subsequently became the final decision of the Board.

On appeal to the Federal Circuit, Mr. Bryant argued that the agency’s decision was flawed because the deciding official applied a substantial evidence standard instead of determining whether the charge was established by a preponderance of the evidence, as required under *Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290 (Fed. Cir 2021). Mr. Bryant further argued that the Board’s decision to uphold the penalty was contrary to law because the agency and the Board failed to properly consider the *Douglas* factors, as required under *Connor v. Department of Veterans Affairs*, 8 4th 1319 (Fed. Cir. 2021). Finally, Mr. Bryant contested the Board’s findings on his

affirmative defense.

**Holding:** Applying *Rodriguez* and *Connor*, the court vacated the portion of the Board's decision that sustained the charge and penalty and remanded for further proceedings under the correct legal standard. The court affirmed the portion of the Board's decision finding that the appellant failed to prove his defense of whistleblowing reprisal.

1. The court explained that it held in *Rodriguez* that the agency may not use a "substantial evidence" standard in taking an action under § 714. Rather, under § 714, the agency must use a "preponderance of the evidence" standard in determining whether the alleged misconduct occurred. The references to "substantial evidence" in § 714 "are all explicitly directed to the standard of review to be applied by administrative judges and the Board."
2. Because the deciding official used the incorrect standard of proof in reaching the final decision, the court vacated for further proceedings under the correct legal standard. The court suggested that this would involve a remand to the agency: "Presumably those further proceedings will include the Board requiring the VA's deciding official to determine whether the evidence as to the charge against Mr. Bryant satisfied the requisite preponderance-of-the-evidence standard of proof."
3. The court further found that the Board's penalty analysis was legally erroneous under *Connor*, because the Board (and the agency) failed to apply the *Douglas* factors. Accordingly, for that independent reason, the court vacated the penalty portion of the Board's decision and remanded for further proceedings under the correct legal standard. Because the court was remanding the case under *Rodriguez* in any event, the court declined to address the agency's argument that the failure of the agency and the Board to consider the *Douglas* factors was harmless error.
4. Finally, the court found no basis for disturbing the Board's conclusion that Mr. Bryant failed to show that his whistleblowing activity was a contributing factor to the personnel action. Accordingly, the court affirmed the Board's decision with respect to the affirmative defense.

**NONPRECEDENTIAL:**

*Allbee v. Department of Homeland Security*, No. [21-1608](#) (Fed. Cir. Feb.22, 2022) (DA-0752-20-0238-I-1)

The agency removed the appellant from his Supervisory Border Patrol Agent position for unauthorized travel expenses (25 specifications), making unauthorized cash withdrawals on a government travel card, and failure to cooperate in an official investigation. On appeal, the administrative judge (AJ) found that the agency proved only charge 1, and only 20 of the 25 underlying specifications. However, the AJ determined that the agency had demonstrated a nexus between Mr. Albee's misconduct and the efficiency of the service, and that the removal penalty was reasonable. On appeal to the Federal Circuit, the appellant argued the following: (1) that the AJ erred in ruling that the agency did not have to prove that the appellant had fraudulent intent when he submitted the vouchers at issue in charge 1; (2) that the AJ erred in finding that the agency proved 20 of the 25 specifications by a preponderance of the evidence; (3) that the agency failed to demonstrate a nexus between the misconduct alleged in charge 1 and the efficiency of the service; and (4) that the AJ erred in finding that the removal penalty was reasonable. Regarding the first argument, the court agreed with the AJ that neither the charges nor the underlying specifications referred to any intent on the part of Mr. Albee. The court further found that the AJ's findings on the 20 sustained specifications of charge 1 were supported by substantial evidence. The court also agreed with the AJ that the agency established nexus, and found that, contrary to the appellant's arguments, the 6-year delay between the misconduct and the removal was not relevant to determining nexus. Finally, the Board agreed with the AJ that the agency had considered the relevant *Douglas* factors and that the penalty of removal was reasonable.